UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

VISION BUILDERS, LLC Plaintiff, vs. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, Defendant	Case No.: 1:19-cv-3159 COMPLAINT

I. INTRODUCTION

1. This is an action brought pursuant the Administrative Procedure Act, 5 U.S.C. § 702, et. seq., seeking to hold unlawful and set aside the decision of the California Service Center (CSC) Director of the United States Citizenship and Immigration Services (USCIS) in File No. WAC1918550939, denying Vision Builders, LLC's ("Vision Builders") Form I-129, Petition for Nonimmigrant Worker, filed upon behalf of Philip Potgieter. Defendant's decision is unlawful and must be set aside under the standards of 5 U.S.C. § 706.

2. This case illustrates why Congress created the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*., and the bureaucratic monster that can be spawned by neglecting its requirements.

3. Congress authorized United States employers to hire and employ temporary ("nonimmigrant") foreign professionals in "specialty occupations" ("H-1B" visa). 8 U.S.C. §§ 1101(a)(15)(H)((i)(b), 1182(n), and (1184(i).

4. To qualify for an H-1B specialty occupation, the employer must show that the position requires the "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's degree or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1)(A), and (B). The statute continues on to explain that an actual degree is not required, but experience equivalent to a degree will suffice. 8 U.S.C. §§ 1184(i)(1)(B) and (2)(C).

5. Congress delegated authority to make regulations concerning this category to the Department of Labor ("DOL") and the Department of Homeland Security ("DHS"), United States Citizenship and Immigration Service ("USCIS"). *Id.* at §§ 1103, 1182(n), and 1184(a). The qualifying degree requirement in Section 1184(i)(1)(B) was determined to lack clarity, and Defendant's predecessor the Immigration and Naturalization Service ("INS") filled in the gaps with 8 C.F.R. § 214.2(h)(4)(iii)(A). While Defendant USCIS has binding regulations defining what "qualif[ies] as a specialty occupation," the agency does not follow those rules. *Id*.

6. With no prior publication, and no explanation in its decisions, Defendant has undertaken a sea change in its approach to specialty occupations. At present, it is impossible for a member of industry or even attorneys to read the statute, regulations, forms, and instructions to the forms, and understand what Defendant *actually* requires for approval of an H-1B petition. Moreover, Defendant's written decisions provide neither law, nor an explanation of the basis of denial that provides clarity for how future petitions could comply with these unwritten rules.

II. PARTIES

7. Plaintiff Vision Builders formed in 2008 and is headquartered in Charlotte, North Carolina. Plaintiff provides professional and architectural design consulting specializing in designing foodservice facilities. Plaintiff primarily designs dining and kitchen facilities for

corporate offices, industrial production sites, schools, hospitals, and restaurants, among others. Plaintiff has been harmed by Defendant's unlawful denial of its petition for immigration benefits on behalf of Philip Potgieter ("Beneficiary").

8. Defendant is United States Citizenship and Immigration Service ("USCIS" or "Defendant"). USCIS is a component of the Department of Homeland Security ("DHS"). DHS is an executive agency of the United States, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). DHS assumed responsibility from the Immigration and Nationality Service ("INS" or "Defendant") on March 1, 2003, to administer responsibilities under the Immigration and Nationality Act (INA) and in particular to fulfill its duties to adjudicate employment-based immigrant and nonimmigrant visa petitions.

III. JURISDICTION

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as this is a civil action arising under the Constitution, laws, or treaties of the United States. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 2201, as this is a civil action seeking, in addition to other remedies, a declaratory judgment.

10. The United States has waived sovereign immunity, allowing this Court to review challenges to final agency actions and unlawfully withheld action under Administrative Procedure Act ("APA"). 5 U.S.C. § 702. The standards of review for these actions are found in 5 U.S.C. § 706.

11. Plaintiff has a legally protected interest to ensure a decision by the USCIS complies with the requirement of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and the standards of the APA at 5 U.S.C. § 706(2). Plaintiff has been impacted by Defendant's decision and has standing because it is in the zone-of-interest. *Match-E-Be-Nash-She-Wish Band*

of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012). Defendant's violation of the law has created a concrete injury in that Plaintiff, can no longer hire and employ a valuable employee, Philip Potgieter. This harm was caused by Defendant's unlawful denial of the immigration petition WAC1918550939. A favorable decision from this court will result in Defendant's decision being overturned, the approval of petition WAC1918550939 and Plaintiff will be allowed to hire and employ the beneficiary. Consequently, Plaintiff has standing to complain of this action. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

IV. VENUE

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1), because Defendant is headquartered and resides in this district. Further, the denial is based on national policies and interpretations of law. There is no connection to the site of the adjudication here. The adjudicators at the Vermont Service Center are bound by Defendant's policies and exercise very little (if any) discretion over the adjudications. Further, dozens of cases challenging H1B Visa denials based on national policies are currently pending in this Court as venue is proper and transfer is inappropriate. In fact, plaintiffs have filed cases where the service centers reside, claiming venue was proper and the courts have transferred those cases to this District.

V. PROCEDURAL HISTORY

13. On April 11, 2019, Plaintiff filed its Form I-129, Petition for Nonimmigrant Worker, and supporting documentation in support of an H-1B visa petition on behalf of Philip Potgieter (Beneficiary). Plaintiff sought to hire and employ the Beneficiary as its Vice President of Strategic Planning. The Beneficiary's work and academic experience has been evaluated by an expert to be the equivalent of a bachelor's degree in business administration. In addition, he has worked extensively in the construction field related to food service facilities.

14. Plaintiff provided all regulatorily required documentation with the petition.

15. On June 26, 2019, Defendant issued a Request for Evidence (RFE), and Plaintiff responded on September 22, 2019.

16. On September 23, 2019, Defendant denied the petition because it did not believe Plaintiff established any of the four regulatory requirements for demonstrating the position required a college degree.

VI. LEGAL BACKGROUND

A. ADMINISTRATIVE PROCEDURE ACT

17. Federal agencies must comply with the Administrative Procedure Act ("APA") when crafting and enforcing decisions, regulations, legislative rules. 5 U.S.C. § 553.

18. Courts have authority to review and invalidate final agency actions that are not in accordance with the law, exceed agency authority, lack substantial evidence, or are arbitrary and capricious. 5 U.S.C. § 706.

B. IMMIGRATION AND NATIONALITY ACT

19. All "aliens" are presumptively inadmissible to the United States, and apply for an exception to this general prohibition by filing petitions and applications with Defendant. 8 U.S.C. § 1182, and 5 U.S.C. § 551(11) and (13) (categorizing exceptions and exemptions from statutory prohibitions as "relief").

20. Immigration petitions are written applications for immigration benefits and are reviewed and processed using the procedures at 5 U.S.C. § 555(f).

21. The evidentiary standard applied to these applications and petitions is the "preponderance" standard. *See* 8 U.S.C. § 1361, 8 C.F.R. § 103.2(b).

22. The Immigration and Nationality Act (INA) of 1990 separates employment-based visas into two categories: nonimmigrant (temporary) and immigrant (permanent, or green card). *See* 8 U.S.C. §§ 1101(a)(15), 1153 and 1182. Generally speaking each nonimmigrant visa has a corresponding immigrant visa category. *See id.*

23. Professional workers (requiring a bachelor's, master's degree, or equivalent to such degrees) can temporarily enter and work for a United States employer using an H-1B visa. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B visa is open to "specialty occupations," a term that is defined at 8 U.S.C. § 1184(i)(1) and (2) as:

> (1) an occupation that requires—
>
> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
>
> (2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—
>
> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

24. Defendant determined that the statutory definition of specialty occupation and its degree requirement were ambiguous and not sufficiently instructive, and created regulations clarifying the occupation's degree requirement. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984) (requiring Courts to follow the properly promulgated

regulations of an agency when a statute is ambiguous). The regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) state that:

> To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) *A baccalaureate or higher degree* or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in *parallel positions among similar organizations* or, in the alternative, an employer may show that its *particular position is so complex or unique* that it can be performed only by an individual *with a degree*;
>
> (3) The employer normally requires *a degree or its equivalent* for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the *attainment of a baccalaureate or higher degree*.

Emphasis added.

25. By the plain language of the statute, no degree is required to qualify for a specialty occupation. Rather, experience equivalent to the type of work performed by a formally educated professional will suffice.

26. By the plain language of Defendant's own regulations, the touchstone of a "specialty occupation" is an ability to critically think and perform analysis on a level that is expected of a college graduate holding "**A** baccalaureate or higher degree…" *Id.* The use of the expansive article "a" in the regulation addresses the unambiguous language in the statute, indicating it is the intellectual ability developed through studies that matters, not the name of the degree, that qualifies a position as a specialty occupation. This is the definition that the Court must defer to. *Chevron*, 467 U.S. 837, *See also Residential Finance Corp. v. USCIS*, 839 F.

Supp. 2d 985, 996 (S.D. Ohio 2012) (overturning USCIS denial of an H-1B visa on the same grounds as discussed in this case).

27. The regulatory explanation of what qualifies as a specialty occupation, with its expansive degree requirement, is not ambiguous. An employer can satisfy the degree requirement by showing that it is normal, common, or usual for United States workers in the position to hold a degree.

28. However, a recent Freedom of Information Act lawsuit has disclosed that the agency now interprets its regulations in a way that contradicts the plain language. The agency now interprets the requirement for a degree to be necessary, and not normal. *See* 8 C.F.R. § 214.2(h)(iii)(4)(A)(1).

29. Moreover, the agency has created a One-Degree Rule. Under this rule, USCIS refuses to find a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the proffered position does not require one specific degree.

30. Various courts have identified this rule and rejected it:

> [USCIS's] implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.

Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs., 839 F. Supp. 2d 985, 996–97 (S.D. Ohio 2012); *see also Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).

31. In fact, this Court recently rejected this rule in In *Relx, Inc. v. Baran*, No. 19-1993, 2019 WL 35557699 (D.D.C. Aug. 5, 2019).

32. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

33. The One-Degree Rule is ultra vires and arbitrary and capricious. It is further entitled to no deference.

34. Similarly, USCIS has created a Most, But Not All Rule.

35. USCIS considers the OOH authoritative and dispositive.

36. The OOH separates occupations into five separate job zones. The job zones correspond with the overall experience, job training, and education required for entry into a particular occupation. See Job Zone Procedures (available at https://www.onetcenter.org/dl_files/JobZoneProcedure.pdf (last visited April 16, 2019).

37. Relevant to specialty occupations, the OOH states that the education necessary to enter into an occupation in Job Zone Four as follows: "Most of these occupations require a four-year bachelor's degree, but some do not." *Id*. at 12. The particular OOH entries on the O*Net then identify the percentages of employees in that field that have a four-year degree (and higher) versus those that do not.

38. USCIS, rather than considering the "most" language or the percentage of employers that require a bachelor's degree or more, seizes on the "some do not" language associated with all Job Zone Four positions and deems it binding. USCIS reasons that, because some positions do not require college degrees or more, the proffered Job Zone Four position cannot be a specialty occupation.

39. Under the Most, But Not All Rule, USCIS refuses to find a "baccalaureate or

higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the OOH reports that most but not all positions require a bachelor's degree or higher in a specific occupation.

40. Thus, under this rule, a proffered position can only satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A) if it is in Job Zone Five.

41. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

42. The Most, But Not All Rule is ultra vires and it is arbitrary and capricious.

VII. CAUSE OF ACTION

COUNT I

(Violation of the Administrative Procedure Act)

43. Plaintiff re-alleges all facts herein.

44. Federal courts have authority to hear challenges to final agency actions, and hold unlawful actions that are:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute…

5 U.S.C. § 706.

45. Agency actions that are not authorized by statute are unlawful. *See United States v. Mead Corp.,* 533 U.S. 218 (2001) (lack of statutory authority to make rules with the force and effect of law led to invalidation of agency regulations). Agency actions that contradict the statute are unlawful. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute). Federal courts have authority to hear challenges to final agency actions, and hold unlawful actions that are:

46. The statute requires Defendant to perform two tasks: determine if the position is a "specialty occupation;" and, determine if the employee has the requisite qualifications for the position described by the employer. 8 U.S.C. § 1184(i).

47. Defendant determined the statutory definition of "specialty occupation" was ambiguous, and created regulations setting standards for how a position qualifies as a specialty occupation. *See* 8 C.F.R. § 214.2(h)(iii)(4)(A).

48. Defendant's denial is a final agency action that aggrieved Plaintiff. 5 U.S.C. § 704.

49. A final agency action is arbitrary and capricious where:

> USCIS has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before USCIS, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

50. Plaintiff satisfied the regulatory definition of "specialty occupation." Defendant's decision violates the APA because it is not in accordance with the statute or properly promulgated regulations. Defendant's decision contradicts the plain and express language of both statute and regulation.

51. Defendant's decision is arbitrary and capricious because it misstated the law and evidence when evaluating 8 C.F.R. § 214.2(h)(iii)(4)(A)(1)-(4).

52. Defendant's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is based, in part, on its One Degree Rule and its Most, But Not All Rule.

53. Defendant's denial violates the APA because its bases—its One Degree Rule and its Most, But Not All Rule—are ultra vires and, therefore, the Denial is in excess of statutory jurisdiction, authority, or limit. 5 U.S.C. § 706(2)(C).

54. Defendant's denial violates the APA because its basis—its One Degree Rule and its Most, But Not All Rule—constitute legislative rules that did not go through notice and comment rulemaking and, therefore, the denials are without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

55. Defendant's denial violates the APA because its basis—the One Degree Rule—is ultra vires and arbitrary and capricious. *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.*, 839 F. Supp. 2d 985, 996–97 (S.D. Ohio 2012); *see also Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).

56. Defendant's denial violates the APA because its basis—the Most But Not All Rule—is ultra vires and arbitrary and capricious.

57. Defendant's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it lacks reasoned decision making as it considered the evidence submitted individually and without reference to other portions of the record.

58. Defendant's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it considered factors Congress did not intend USCIS to consider.

59. Defendant's determination that the proffered position is not a specialty occupation is arbitrary and capricious because its rationale runs counter to the evidence in the record.

60. Defendant's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it dismissed with no basis expert letters offered in support of the petition.

61. Defendant's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is so implausible it cannot be the result of agency expertise.

62. Defendant's decision is arbitrary and capricious because it rejected DOL's Occupational Outlook Handbook's determination that a degree in business administration or experience equating to a degree is *normally* required as the minimum for entry into the field as a General and Operations Manager, Top Executive.

63. Defendant's denial is arbitrary and capricious because it ignores the reference in the record to SOC Code 11-1021.00 that indicates "most" jobs in that category require a college degree.

64. Defendant's decision is arbitrary and capricious because it misstated the law and rejected evidence without explanation when evaluating the degree requirement in the industry and complexity of the position under 8 C.F.R. § 214.2(h)(iii)(4)(A)(2).

65. Defendant's decision is arbitrary and capricious because it rejects 8 C.F.R. § 214.2(h)(iii)(4)(A)(3) and fails to acknowledge or explain why it rejected evidence that Plaintiff hires employees with the requisite degree for these positions.

66. Defendant's decision is arbitrary and capricious because it rejects evidence in the record without a reasoned explanation and failed to consider evidence material to the complexity and knowledge required for the position under 8 C.F.R. § 214.2(h)(iii)(4)(A)(4).

67. Plaintiff will lose the H1B Visa number that it was accorded by being selected in the FY 2019 lottery. That visa number may now be given away to other FY 2019 lottery winners. Because there is no guarantee that Plaintiff may be picked in the FY 2020 lottery, it is irreparably harmed by losing this visa number.

68. Plaintiff will lose significant revenue due to its inability to fill its position without the beneficiary, and it will be irreparably harmed.

69. Finally, until Plaintiff acquires the certified administrative record, it will be unable to identify all claims of error; Plaintiff expressly reserves the right to make additional claims of error under the APA after production of the certified administrative record.

PRAYER FOR RELIEF

Wherefore, in view of the above authority, Plaintiff prays for the following relief:

1. Assume jurisdiction over this matter;
2. Hold Defendant's decision is unlawful;
3. Order Defendant to approve the petition;
4. Grant all relief that is necessary and proper;
5. Award attorney's fees under the Equal Access to Justice Act.

October 22, 2019

Respectfully submitted,

s/Bradley B. Banias
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